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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM DION GUNN,

Defendant and Appellant.

B167209

(Los Angeles County
Super. Ct. No. VA072570)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Larry S. Knupp, Judge. Affirmed.

Stuart Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, and Herbert S. Tetef, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Appellant William Dion Gunn challenges his corporal injury to a spouse conviction on the ground the trial court committed several evidentiary errors. He argues the court improperly excluded evidence of the victim's prior convictions and her encounter with appellant's girlfriend and improperly admitted evidence regarding the battered women's syndrome and the victim's prior consistent statements.

We conclude any error by the trial court in sanitizing the victim's convictions was harmless, as appellant obtained the best possible result with respect to the inference he sought to have the jury draw from the nature of those convictions. Appellant failed to preserve his claims regarding the exclusion on hearsay grounds of statements made by the victim and appellant's girlfriend during prior encounters. Moreover, any error in their exclusion was harmless. The court properly admitted brief testimony regarding the battered women's syndrome because the victim voluntarily maintained an intimate relationship with appellant after he repeatedly threatened to kill her and the defense relied upon this inconsistent behavior by the victim. Appellant also forfeited any claim regarding the admission of the victim's prior consistent statements about the incidents giving rise to several of the charges by failing to object and by introducing the same prior statements on cross-examination.

BACKGROUND AND PROCEDURAL HISTORY

Appellant forced his way into his estranged wife's apartment, and then choked and beat her. After he stopped, she calmed him, and then agreed to have sex with him. After he left her apartment, she called the police.

Appellant pled no contest to one count of contempt of court, based upon the violation of a protective order. A jury convicted him of corporal injury to a spouse, but acquitted him of spousal rape, cutting a utility line, and three counts of criminal threats. The jury could not reach a verdict on an additional criminal threats count. The court declared a mistrial on that count and subsequently dismissed it. The trial court sentenced appellant to four years in prison.

DISCUSSION

1. Any error by the court in sanitizing the victim's convictions was harmless.

Prior to trial, the prosecutor sought to exclude, under Evidence Code section 352, evidence of victim Maxine's three 1995 misdemeanor prostitution convictions. Defense counsel argued the convictions were relevant to Maxine's credibility because they were misdemeanor acts of moral turpitude and because she had not told appellant about them. The trial court denied the motion on the ground the convictions were for crimes of moral turpitude. The prosecutor then asked that the convictions be "sanitized." Defense counsel agreed to the sanitization, provided the jury would understand that the crimes involved moral turpitude and that "the kinds of things she lied about" would be of particular significance to her "potential husband/boyfriend." The court suggested referring to the prior convictions as "crimes of moral turpitude involving dishonesty."

During direct examination, Maxine admitted that in 1995 she was "convicted three times for misdemeanors that involved morale [*sic*] turpitude" and did not tell appellant about that part of her past. On cross-examination, defense counsel asked Maxine whether she attempted to hide those crimes from appellant. She denied doing so, but admitted she never told appellant about them. Counsel asked her whether she was afraid that if appellant found out about those crimes, he would not date or marry her. She again denied it. She also denied attempting to persuade appellant that someone else had committed those crimes.

Appellant contends the trial court erred by sanitizing the convictions. He contends the identity of the crimes was necessary to show Maxine's "readiness to harm him with falsehoods about her sexual conduct."

Relevant evidence should be excluded if the trial court, in its discretion, determines that its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. (Evid. Code, § 352.)

We review the trial court's determination under Evidence Code section 352 for abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

As a preliminary matter, respondent contends appellant forfeited his contention by agreeing to the sanitization of the convictions. Appellant expressly agreed the convictions could be sanitized, but asked the court to convey the significance the unrevealed convictions might have had to the future of the relationship between appellant and Maxine. Appellant did not, however, object to or suggest alternate phrasings or necessary elements when the court suggested referring to the crimes as "crimes of moral turpitude involving dishonesty." The trial court permitted appellant to ask Maxine about the perceived significance of the crimes to her relationship with appellant.¹

Assuming appellant did not forfeit his claim and the trial court erred, we conclude the error was harmless. Appellant insisted in the trial court, and insists on appeal, that the purpose of informing the jury of the prostitution convictions was not to show that Maxine was promiscuous or generally immoral, but to diminish her credibility by showing her "readiness to harm him with falsehoods about her sexual conduct." Falsehoods about her sexual conduct, however, were relevant only to the spousal rape charge, of which appellant was acquitted. Accordingly, appellant could not have obtained a more favorable result even if the jury were informed of the nature of Maxine's convictions and drew the precise inference appellant wanted: that Maxine would lie about her sexual conduct to harm appellant. The only charge of which appellant was convicted was supported not only by Maxine's testimony, but also by photographs of Maxine's injuries and the testimony of a nurse who found Maxine's injuries were consistent with her description of the beating appellant inflicted upon her.² The error was therefore

¹ Appellant's reply brief suggests the trial court "could have allowed Maxine to testify" to such matters. The court did nothing to prohibit defense counsel from asking, or Maxine from testifying, to any of these points. Indeed, defense counsel asked Maxine about several of the points raised in the reply brief, and Maxine denied them.

² At trial, appellant argued the marks depicted in the photographs were not severe enough to be consistent with the blows Maxine testified appellant struck. However, the

harmless. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. Appellant failed to preserve his claims regarding exclusion of non-hearsay statements and any error was harmless.

Wanda Tarver-Dean testified for the defense. She was appellant's friend and dated him after he separated from Maxine. She testified that the first time she saw or met Maxine was at appellant's apartment. Maxine knocked on the door and Tarver-Dean approached to answer it. Maxine then "started to call [appellant] actually she called out open the F en door. Who the F is that? I know you're not screwing some - -" The prosecutor objected on the ground of hearsay, and the trial court sustained the objection and struck the testimony. Defense counsel then asked Tarver-Dean whether Maxine was calm, excited or angry. The prosecutor objected on the ground of relevance, and the court conducted an unreported bench conference. Tarver-Dean then testified that Maxine was angry and hysterical. She further testified that in subsequent telephone conversations, Maxine called her names, threatened her, and made disparaging remarks about appellant's relationship with her.

Tarver-Dean also testified that on one occasion she and Maxine were in appellant's apartment simultaneously, and appellant told her he was reuniting with Maxine. Counsel asked Tarver-Dean whether she interacted with Maxine. Tarver-Dean responded, "I asked her, I said - -" The prosecutor again objected that the response was hearsay, and the trial court sustained the objection. Defense counsel re-asked the question, and Tarver-Dean testified there was an interaction that included hostile body language. She further testified Maxine once threatened to "kick [her] ass."

Appellant contends the trial court did not understand the hearsay rule and

crime of inflicting a corporal injury upon a spouse requires only a "traumatic condition," which is defined as "a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force." (Pen. Code,

erroneously sustained objections to the portions of Tarver-Dean's testimony quoted above. He argues the rulings prevented him from presenting evidence of "Maxine's irrational jealousy, vindictiveness, disregard of the rights and dignity of others, and poor self-control."

In order to preserve any evidentiary point for appellate review, the proponent of the evidence must either make an adequate offer of proof or ask questions that presage the expected response. (*People v. Eid* (1994) 31 Cal.App.4th 114, 126.) In addition, he must raise his theory of admissibility in the trial court in order to rely upon that theory on appeal. (*People v. Fauber* (1992) 2 Cal.4th 792, 854.) With respect to the first excluded response, appellant neither explained to the court his theory of admissibility nor made an offer of proof on the record. He may have done so during the unreported bench conference, but it is not reflected in the record.

Assuming appellant preserved his present claims regarding the first excluded response by expressing them in the unreported bench conference, it appears the trial court erred. An out-of-court statement constitutes hearsay only if it is offered to prove the truth of the matter stated. (Evid. Code, § 1200.) Appellant argues he was simply trying to establish "that it was said, and how it was said." Unlike making or accepting a contractual offer or giving consent to a search, the making of these statements was not, in itself, of any relevance. Nor was the manner in which Maxine made the statements relevant. The only possible relevance of the statements was to show that Maxine was angry or jealous on an occasion several months prior to the crime of which appellant was convicted. The statements arguably would have supported a rather weak inference that Maxine fabricated the charges against appellant or exaggerated the severity of his conduct because she remained angry and jealous months afterward.

In any event, the exclusion of the statements was harmless. The statements were made in May 2002, about three months before the August 20, 2002 the date when

§ 273.5, subd. (c).) Thus, minor, temporary wounds were sufficient to support the

appellant attacked Maxine. In addition, Tarver-Dean testified Maxine was angry and hysterical during their initial meeting, which seems to have been the testimony that defense counsel was attempting to elicit. Maxine admitted she was so upset when she found another woman at appellant's apartment that she broke windows in the apartment and in her own car, which appellant had been using. As a result, she spent three weeks in jail. In addition, the remainder of Tarver-Dean's testimony depicted Maxine as jealous, angry and threatening. Furthermore, as noted in the context of the first issue, the sole count of which appellant was convicted was supported by physical evidence and the testimony of a nurse who examined Maxine.

With respect to the second excluded statement, regarding the statement Tarver-Dean made to Maxine on a different occasion, appellant clearly made no offer of proof. He therefore forfeited any claim regarding the trial court's ruling on the objection. Moreover, a statement by Tarver-Dean to Maxine has no tendency to reflect upon Maxine's credibility. Accordingly, the court would properly have excluded it as irrelevant.

Appellant also contends the trial court's misinterpretation of the hearsay rule "had the effect of terminating entire lines of questioning" regarding Maxine's attitude and conduct towards appellant, thereby preventing him from introducing other unspecified evidence. Appellant's failure to make an offer of proof regarding these "lines of questioning," however, precludes him from raising any claim of error in regard to the unspecified evidence.

3. The trial court properly admitted battered women's syndrome evidence.

Maxine testified that two months before the physical assault, appellant telephoned her from outside the building where she worked. He told her he was going to kill her. On the same occasion, he left messages at her work threatening to kill her and everyone

conviction.

else present. He also threatened another employee who answered the phone. Maxine's employer telephoned the police. Maxine found the threats "scary," but did not take appellant as seriously on that occasion as she did on others. On July 25, 2002, a little less than one month before the physical attack upon her, appellant telephoned her and stated he was making plans to kill her that weekend. She believed him and called the police.³ On cross-examination, she admitted that about four days after appellant made that threat, they engaged in consensual sex. She also admitted that she continued to call appellant on a daily basis between the date he threatened her and the date of the physical attack. She and appellant went through "up and down phases" of getting along and about things appellant did that frightened or upset her.

Toni Zaragoza, the nurse practitioner who examined Maxine after the attack, testified she had been specially trained regarding domestic violence. The prosecutor asked her whether it was common for a person who is victimized by an abuser to remain in the relationship. Defense counsel objected that the question called for testimony regarding the battered women's syndrome. He argued there was insufficient foundation for that testimony because Maxine had not testified to any prior incidents of physical violence. The prosecutor argued the threats followed by reconciliations provided the necessary support for the evidence. The trial court overruled appellant's objection on the ground that there was a pattern of "difficulties, reconciliation, sex, difficulties, reconciliation, sex," and appellant was defending on a theory that Maxine was not really afraid of him, as shown by her ongoing consensual sexual relationship with him.

Zaragoza then testified a "honeymoon phase" in a relationship exists when everything goes well, and then the submissive partner may "set the fuse off." It is not unusual for "up[s] and down[s]" to occur in a relationship. Zaragoza did not express an opinion regarding Maxine's relationship with appellant.

Appellant contends the trial court erred by permitting Zaragoza to testify regarding

³ This threat provided the factual basis for the criminal threats charged in count

the battered women's syndrome. He argues that evidence was insufficient that the battered women's syndrome applied to Maxine in the absence of any history of violence or psychological abuse. He also argues the evidence was not relevant to any contested issue.

Battered women's syndrome evidence is admissible under Evidence Code section 1107: "(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge. [¶] (b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on battered women's syndrome shall not be considered a new scientific technique whose reliability is unproven. [¶] (c) For purposes of this section, 'abuse' is defined in Section 6203 of the Family Code and 'domestic violence' is defined in Section 6211 of the Family Code or acts defined in Section 242, subdivision (e) of Section 243, or Section 262, 273.5, 273.6, 422, or 653m of the Penal Code."

In order to be relevant for a non-propensity purpose, sufficient evidence must indicate that the syndrome applies to the woman involved in the case and "there must be a contested issue as to which the syndrome testimony is probative." (*People v. Gadlin* (2000) 78 Cal.App.4th 587, 592.) Where the battered women's syndrome evidence is not used defensively (i.e., the person to whom the battered women's syndrome allegedly applies is the victim, not the defendant), evidence of prior physical abuse is not necessary. (*People v. Williams* (2000) 78 Cal.App.4th 1118, 1129-1130.)

Although there was no evidence of any prior physical assault by appellant upon

seven, of which appellant was acquitted.

Maxine, his threatening telephone calls violated Penal Code section 653m and qualified as domestic violence under Evidence Code section 1107, subdivision (c). In addition, the threats he made in a call on July 25, 2002 also constituted abuse, as defined by Family Code section 6203, subdivision (c), which includes words or conduct placing “a person in reasonable apprehension of imminent serious bodily injury to that person or to another.” Appellant argues Maxine did not believe his threats and the threats did not involve imminent harm. The testimony appellant cites pertains to the threats appellant made on June 20, 2002, not to the threats made on July 25, 2002. Although Maxine testified the June threats were “scary,” she did not take the June threats as seriously as those appellant made at other times. With respect to the July 25 threat, however, she testified she believed appellant when he said he was making plans to kill her that weekend. She called the police regarding that threat. July 25, 2002 was a Thursday, and a threat to kill her on the weekend constituted a threat of imminent serious bodily injury.

Maxine’s behavior in continuing a consensual sexual relationship and telephoning appellant after he repeatedly threatened to kill her was consistent with the battered women’s syndrome. Instead of avoiding all contact with appellant after he repeatedly threatened to kill her, she voluntarily maintained an intimate relationship and frequently initiated communication with him. Battered women’s syndrome “evidence speaks directly to both recantation and reunion by a domestic abuse victim, especially where such actions are used to attack her credibility.” (*People v. Gadlin, supra*, 78 Cal.App.4th at p. 594.) Accordingly, the record supports a conclusion that the syndrome applied to Maxine. Even though Maxine did not recant her accusations, the syndrome testimony was probative of a contested issue because appellant used Maxine’s ongoing, voluntary relationship with him to cast doubt upon her credibility and to defend against the criminal threats and rape charges on the theories she was not placed in fear by appellant’s threats and the sexual contact was consensual. Accordingly, appellant’s claims have no merit.

Moreover, Zaragoza’s testimony regarding the battered women’s syndrome was brief and general. She essentially testified the dominant partner takes power away from

the submissive partner, and it is not unusual “to see people who have gone through that circle or up and down phase in their relationship with the abuser.” She did not testify to the mechanics of the battered women’s syndrome or opine that Maxine was operating under its influence.

4. Appellant forfeited his claims regarding admission of Maxine’s prior consistent statements to Zaragoza.

Zaragoza testified that during her assessment and examination, Maxine stated her ex-husband had attacked her. Zaragoza repeated Maxine’s statements, which were noted in her report: “He told her that if she had sex with him, that he would not - - if she had sex with him, he wouldn’t hurt her or the children. [¶] . . . [¶] He wanted her to have sex with him. And then he threatened her because if she started acting funny, he used a word tripping, and that’s what she used, . . . then at that time he would - - she would - - he would hurt her. But hurt her and the children. So she felt and she saw the change in him, so she knew that she should just go along with him to protect the kids and herself.” Zaragoza also testified she asked Maxine how she had received the marks on her body, and Maxine said her ex-husband has hit her. Appellant did not object to any of this testimony.

On cross-examination, at the specific request of defense counsel, Zaragoza read aloud two sections of her report in which she recorded Maxine’s statements.⁴

Appellant contends the trial court erred by admitting these prior consistent statements by Maxine.

Appellant forfeited his claims by failing to object when the prosecutor asked

⁴ Zaragoza testified Maxine made the following statements: “ ‘He said if I did what he wanted, I would be okay. But if I start tripping, he would kill me and the kids tonight. That’s why I had sex with him. When initially said I didn’t want to have sex, he started to hit on me. Then I said fine, whatever you want to do.’ ” “ ‘He held my hair from both sides of my head. And while he was sitting on top of me and then he picked my head up’ [and struck her head against the floor]. ‘Once I could remember when I came to, he was sitting on top of me and asked me, asking me if I was dead.’ ”

Zaragoza what Maxine told her and by eliciting a more detailed version of the same evidence on cross-examination. (*People v. Hill* (1992) 3 Cal.4th 959, 994-995 overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046.)

Appellant argues counsel's failure to object constituted ineffective assistance of counsel. A claim that counsel was ineffective requires a showing, by a preponderance of the evidence, of an objectively unreasonable performance by counsel and a reasonable probability that, but for counsel's errors, appellant would have obtained a more favorable result. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

Assuming counsel's failure to object to Zaragoza's testimony regarding Maxine's statements on ground it constituted an objectively unreasonable performance, it is not reasonably probable appellant would have obtained a more favorable result had counsel objected. First, the defense introduced a more detailed version of Maxine's statements to Zaragoza. Appellant has not argued that counsel was ineffective for eliciting the more detailed testimony from Zaragoza. In any event, the jury acquitted appellant of all counts except corporal injury, which was supported by physical evidence, as well as Maxine's testimony and statements to Zaragoza regarding appellant's actions. It is not reasonably probable appellant would have been acquitted of that count had Zaragoza not repeated Maxine's statements to her.

5. Appellant is not entitled to relief upon the basis of the cumulative effect of the trial court's evidentiary rulings.

Appellant contends the cumulative effect of the trial court's errors in admitting and excluding the previously discussed evidence gave the jury "a falsely positive impression of the complaining witness and a falsely negative one of the defendant." However, the acquittal on six counts belies appellant's claim. Had the jury been favorably impressed by Maxine, it would certainly have convicted appellant of at least one or more of the four criminal threats charges, which pertained to the day of the physical assault and the date of July 25, 2002. Moreover, as previously noted, appellant forfeited several of his claims by failing to raise them in the trial court. He can rely upon

neither their individual nor cumulative effect to overturn his conviction.

DISPOSITION

The judgment is affirmed.

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BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.